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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL YBARRA,

Defendant and Appellant.

F072244

(Super. Ct. No. BF159904A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. John R. Brownlee, Judge.

Caitlin Christian, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Harry Joseph Colombo, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Kane, Acting P.J., Franson, J. and Meehan, J.

INTRODUCTION

Appellant Michael Ybarra was found guilty of first degree burglary, a violation of Penal Code section 460, subdivision (a).¹ It also was found true that a person, not an accomplice, was present in the residence at the time of the burglary. (§ 667.5, subd. (c)(21).) Ybarra contends the trial court had a duty to instruct the jury with a unanimity instruction and failure to do so is reversible error. We disagree and affirm.

FACTUAL AND PROCEDURAL SUMMARY

Jagir Kaur Sandhu lives on Camino La Paz in Bakersfield with her husband and father-in-law. Sandhu and her husband work outside the home; her father-in-law does not. The father-in-law has health problems. When Sandhu left for work on the morning of March 11, 2015, she locked all the doors to the house; her father-in-law was inside the home.

On the morning of March 11, 2015, a neighbor, Alejandro Ramirez, was working at home while a crew did some concrete work at his house. Occasionally, Ramirez went outside to check on the crew. One of the crew members was Ramirez's cousin, Oscar Villalon.

Villalon saw a black Honda driving the neighborhood, park, and the driver walk up to the Sandhu home. Ramirez was outside checking on the crew, when he heard what "sounded like someone prying a screen door open" and "metal-on-metal racket." The sound was coming from the Sandhu house next door.

Ramirez could see Ybarra standing by the metal security door with "something in his hands, and he was making contact with the door." Ybarra was using a "long metal bar of some sort." Ramirez went inside his house to retrieve his cell phone and a handgun; he tucked the handgun in his waistband under his shirt. Villalon called 911.

¹ References to code sections are to the Penal Code unless otherwise specified.

Ramirez went to the front gate of the Sandhu home; he heard glass breaking. RT 56–57)! Ramirez called out, “Stop. What are you doing?” A few seconds later, Ybarra came around the house and said he was fixing a lawnmower. Ramirez told Ybarra he did not believe him and to stay where he was until police arrived. Instead, Ybarra disappeared into the backyard.

A few seconds later, Ramirez saw Ybarra “hopping over the fence” while carrying a “gym bag-type duffel bag.” Ramirez asked Ybarra where he was going; Ybarra said he “needed to leave.”

Bakersfield Police Officer Timothy McIrvin was dispatched in response to the 911 call. McIrvin saw the metal screen door had “fresh scratch marks and damage to the screen.” McIrvin was of the opinion the scratches were caused by something that would allow, “enough force to pry” the door open and it appeared someone had attempted entry into the garage through the metal security door.

Villalon gave the license number for the black Honda to McIrvin. The car was registered to Ybarra.

Sandhu returned home; she said the metal security door had not been damaged when she left for work that morning. The security door had been closed and locked when she left for work that morning. Sandhu noticed a small window at the back of her house was broken; glass had fallen into the living room and the latch had been turned to open the window. There also were scratch marks on the sliding glass door that leads into her house. Sandhu said no one had been hired to work on the lawnmower.

On July 15, 2015, an amended information charged Ybarra with first degree burglary in violation of section 460, subdivision (a), and alleged an enhancement pursuant to section 667.5, subdivision (c)(21). On July 20, 2015, the jury returned a guilty verdict on the first degree burglary charge and a true finding on the enhancement.

On August 17, 2015, Ybarra was sentenced to the low term of two years in prison. Presentence and custody credits were awarded and various fines and fees imposed. Ybarra filed a timely notice of appeal on August 26, 2015.

DISCUSSION

Ybarra contends a unanimity instruction should have been given by the trial court as to the first degree burglary charge. The record reflects that CALCRIM No. 3500, unanimity, was withdrawn. The record does not indicate which party requested, and then withdrew, the proposed instruction.

Ybarra asserts the trial court had a sua sponte duty to instruct the jury with a unanimity instruction² as to the burglary charge because some jurors may have believed he committed a burglary by prying open the security door and other jurors may have believed a burglary was committed when he broke a window into the house. Ybarra contends failure to give a unanimity instruction deprived him of due process of law and a unanimous verdict of the jury.

Analysis

Under the California Constitution, a unanimous jury verdict is required to convict a person of a criminal offense. (Cal. Const., art. I, § 16; *People v. Russo* (2001) 25 Cal.4th 1124, 1132.) The jury must agree unanimously the defendant is guilty of a specific crime. (*People v. Diedrich* (1982) 31 Cal.3d 263, 281.)

When a defendant is charged with a single criminal offense, but the evidence suggests more than one discrete crime, either the prosecution must elect among the

² CALCRIM No. 3500 provides as follows:

“The defendant is charged with _____ <insert description of alleged offense> [in Count ____] [sometime during the period of _____ to _____].

“The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which (he/she) committed.”

crimes or the court must require the jury to agree on the same criminal act. (*People v. Russo, supra*, 25 Cal.4th at p. 1132.) This requirement “‘is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.’” (*Ibid.*) “On the other hand, where the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the defendant’s precise role was, the jury need not unanimously agree on the basis or, as the cases often put it, the ‘theory’ whereby the defendant is guilty.” (*Ibid.*)

A unanimity instruction is required as between discrete crimes, but is not required between theories of a case. Thus, a jury need not be instructed on a determination as to whether the defendant is guilty as a direct perpetrator or as an aider and abettor of that crime. (*People v. Russo*, 25 Cal.4th at pp. 1132–1133.) As explained in *People v. Russo*:

“The key to deciding whether to give the unanimity instruction lies in considering its purpose. The jury must agree on a ‘particular crime’ [citation]; it would be unacceptable if some jurors believed the defendant guilty of one crime and other jurors believed her guilty of another. But unanimity as to exactly how the crime was committed is not required. Thus, the unanimity instruction is appropriate ‘when conviction on a single count could be based on two or more discrete criminal events,’ but not ‘where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event.’ [Citation.] In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction.” (*People v. Russo, supra*, 25 Cal.4th at pp. 1134–1135.)

For example, a jury may convict a defendant of first degree murder without making a unanimous determination as to the theories proposed by the prosecution, e.g., the murder was deliberate and premeditated or it was committed during the course of a felony. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 1024–1025; *People v. Beardslee* (1991) 53 Cal.3d 68, 92–93.)

Similarly, unanimity is not required ““when the acts alleged are so closely connected as to form part of one transaction.”” (*People v. Benavides* (2005) 35 Cal.4th 69, 98.) More specifically, “[t]he ‘continuous conduct’ rule applies when the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them.” (*People v. Stankewitz* (1990) 51 Cal.3d 72, 100.)

Assuming for the sake of argument the jury could have chosen between Ybarra’s breaking of the window or prying open the screen door, no unanimity instruction was necessary here. “[T]he offenses are so closely connected [so as] to form a single transaction.” (*People v. Thompson* (1995) 36 Cal.App.4th 843, 851.)

Under the principles explained in *Russo*, a unanimity instruction was necessary only if the evidence left open the possibility that Ybarra committed two distinct burglaries and there was a danger the jury might have found him guilty without agreeing on which burglary he committed. That possibility did not exist here because Ybarra’s acts were so closely connected in time as to form part of one transaction. (*People v. Maury* (2003) 30 Cal.4th 342, 423.)

The facts here are also unlike the example amounting to two different entries requiring a unanimity instruction noted in *Russo*: “If the evidence showed two different entries with burglarious intent, for example, one of a house on Elm Street on Tuesday and another of a house on Maple Street on Wednesday, the jury would have to unanimously find the defendant guilty of at least one of those acts.” (*People v. Russo, supra*, 25 Cal.4th at pp. 1132–1133.) Simply put, in this case, there were not two discrete burglaries necessitating a unanimity instruction. Rather, Ybarra’s entry or entries were “““so closely connected as to form part of one transaction.””” (*People v. Williams* (2013) 56 Cal.4th 630, 682.)

Ybarra’s conduct at the Sandhu residence took place on one day, March 11, 2015, and was part of a continuous course of conduct. Even if the jury was divided as to how the burglary of the Sandhu home was committed, either the pried security door or broken

window, no unanimity instruction was required for the jury to find Ybarra guilty of the single, discrete crime of burglary. (*People v. Russo, supra*, 25 Cal.4th at pp. 1134–1135.)

DISPOSITION

The judgment is affirmed.